

**52ND MILITARY JUDGE COURSE**

**EXTRAORDINARY WRITS AND GOVERNMENT APPEALS**

**Table of Contents**

**I. EXTRAORDINARY WRITS..... 1**

A. INTRODUCTION. .... 1

B. THE ALL WRITS ACT. .... 1

C. JURISDICTION..... 2

D. ACTUAL V. SUPERVISORY JURISDICTION; THE ALL WRITS ACT AND *GOLDSMITH*... 4

E. EXTRAORDINARY CIRCUMSTANCES..... 6

**II. WRIT CLASSIFICATIONS..... 8**

**III. FILING A WRIT. .... 9**

A. PRELIMINARY CONSIDERATIONS..... 9

B. PROCEDURE. .... 10

**IV. GOVERNMENT APPEALS..... 10**

A. INTRODUCTION. .... 10

B. QUALIFYING PROCEEDING. .... 10

C. QUALIFYING RULING. .... 11

**V. GOVERNMENT APPEAL PROCEDURE..... 15**

**VI. APPELLATE REVIEW..... 19**

**VII. CONCLUSION. .... 21**

**MAJ Tyesha E. Lowery**  
**March 2009**

**THIS PAGE INTENTIONALLY LEFT BLANK**

# EXTRAORDINARY WRITS AND GOVERNMENT APPEALS

## Outline of Instruction

### I. EXTRAORDINARY WRITS.

#### A. Introduction.

In 1948, Congress enacted the All Writs Act, 28 U.S.C. §1651(a), which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. The All Writs Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In 1969, the Supreme Court held that the All Writs Act applied to our military appellate courts. *Noyd v. Bond*, 395 U.S. 683 (1969). Consistent with federal courts, our military appellate courts view writ relief as a drastic remedy that should only be invoked in those situations that are truly extraordinary. Further, our courts will exercise extraordinary writ jurisdiction sparingly.

At trial, if a party (usually defense) seeks extraordinary relief, there is no requirement to continue the trial to allow the party to petition the appellate court. If the appellate court grants a stay, however, the military judge must stop the proceedings pending resolution of the issue.

#### B. The All Writs Act.

1. “All Writs Act.” 28 U.S.C. § 1651(a). “The Supreme Court and *all courts established by act of Congress* may issue all writs *necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.*”

2. “[A]ll courts established by act of Congress.” Includes both Court of Appeals for the Armed Forces and service Courts of Criminal Appeals. *United States v. Dowty*, 48 M.J. 102 (1998); *McKineey v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). *See also Noyd v. Bond*, 395 U.S. 683 (1969); *United States v. Curtin*, 44 M.J. 439 (1996); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

C. Theories of Jurisdiction.

1. **Actual Jurisdiction:** The authority of the appellate courts to review a court-martial on direct review.
  - a. Article 66, UCMJ—Court of Criminal Appeals jurisdiction. Every court-martial in which the approved sentence extends to death, dismissal, punitive discharge or confinement for one year or more.
  - b. Article 67, UCMJ—Court of Appeals for the Armed Forces jurisdiction. Every court-martial in which the sentence as affirmed by a Court of Criminal Appeals extends to death . . . cases certified by the Judge Advocate General . . . and cases reviewed by Courts of Criminal Appeals where accused shows good cause for grant of review.
  - c. Article 69, UCMJ—The Court of Criminal Appeals may review any court-martial where action was taken by the Judge Advocate General pursuant to his authority under Article 69, or has been sent to the Court by the Judge Advocate General for review.
2. **Potential Jurisdiction.** The authority to determine a matter that may reach the actual jurisdiction of the court.

- a. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Petition for writ of mandamus to open Article 32 hearing to public where USAF major charged with murder of child. Court found jurisdiction to consider petition for extraordinary relief in exercising supervisory authority over court-martial process, and over cases that may potentially reach court on appeal. Since Article 32 hearing is integral part of court-martial process, then court has jurisdiction to supervise each tier of military justice process. *And see, The Denver Post Corp. v. the U.S. and CPT Robert Ayers*, Army No. 20041215 (February 23, 2005).
  - b. *U.S.N.M.C.M.R. v. Carlucci, et al*, 26 M.J. 328 (C.M.A. 1988); *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990). (“The sentence adjudged by the court-martial included a punitive discharge and so was of a severity that would have authorized direct appellate review by this court. Indeed, even in its commuted form, the sentence is of such severity.” *Id.* at 142). *See also Addis v. Thorsen*, 32 M.J. 777 (C.G.C.M.R. 1991).
3. **Ancillary jurisdiction.** The authority to determine matters incidental to the court's exercise of its primary jurisdiction, such as ensuring adherence to a court order. *Boudreaux v. U.S.N.M.C.M.R.*, 28 M.J. 181 (C.M.A. 1989); *United States v. Montesinos*, 28 M.J. 38, n.3 (C.M.A. 1989) (Because the integrity of the judicial process is at stake, appellate courts can issue extraordinary writs on their own motion).
  4. **Supervisory Jurisdiction.** The broad authority to determine matters that fall within the supervisory function of administering the military justice system.
    - a. *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989). Military appellate courts have jurisdiction to grant extraordinary relief under the All Writs Act over courts-martial that do not qualify for review in the ordinary course of appeal.
    - b. *Jones v. Commander*, 18 M.J. 198 (C.M.A. 1984) (Everett, C.J., dissenting). The court refused to exercise writ jurisdiction over a nonjudicial punishment proceeding.

D. Actual v. Supervisory Jurisdiction; the All Writs Act and *Goldsmith*

1. **Recent Case Law (Pre-Goldsmith).** *ABC Inc. v. Powell*, 47 M.J. 363 (1997). Absent “good cause,” petitions for extraordinary relief should be submitted initially to the Court of Criminal Appeals. The CAAF exercised supervisory jurisdiction under the All Writs Act to grant relief during an Article 32(b) Investigation.
2. *Loving v. Hart*, 47 M.J. 438 (1998). The CAAF has jurisdiction to issue a writ under the All Writs Act even after the case has been affirmed by the Supreme Court. The accused sought extraordinary relief because his death sentence was based in part on a conviction of felony murder that was unsupported by a unanimous finding of intent to kill or reckless indifference to human life. This was an issue raised by Justice Scalia during oral argument before the Supreme Court. The CAAF heard the petition but denied relief.
3. *United States v. Dowty*, 48 M.J. 102 (1998). The CAAF has authority under the All Writs Act to exercise jurisdiction over issues arising from proceedings where the Court would not have had direct review.
4. *Dew v. United States*, 48 M.J. 639 (Army Ct. Crim. App. 1998). Under the All Writs Act, the Army Court has supervisory jurisdiction to consider, on the merits, a writ challenging the action taken by The Judge Advocate General pursuant to Article 69(a), UCMJ. The accused was convicted of making and uttering worthless checks by dishonorably failing to maintain funds. The Office of the Army Judge Advocate General reviewed the case and denied relief. The accused petitioned the Army Court, challenging the decision made by the Office of the Judge Advocate General. The Army Court exercised its supervisory authority under the All Writs Act, heard the petition, but denied relief.

5. *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999). The government involuntarily recalled the accused (a member of the retired reserves) to active duty to face a court-martial. At trial, the accused challenged the jurisdiction of the court-martial. The military judge denied the accused's motion, and the accused petitioned the Air Force Court seeking an extraordinary writ ordering the military judge to dismiss all charges and specifications. The service court held that it had jurisdiction under the All Writs Act to hear the issue and denied the accused's relief. In denying the writ, the court found that the accused was a member of retired reserves, which made him part of the reserve component and subject to lawful orders to return to active duty. Since the accused was in an active duty status at the time of trial, the court-martial did not lack *in personam* jurisdiction.
  
6. *Clinton v. Goldsmith*, 119 S.Ct. 1538 (1999). The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the rolls of the Air Force. The Supreme Court held that the CAAF lacked jurisdiction, under the All Writs Act, to issue the injunction in question because, (1) the injunction was not "in aid of" the CAAF's strictly circumscribed jurisdiction to review court-martial findings and sentences; and (2) even if the CAAF might have had some arguable basis for jurisdiction, the injunction was neither "necessary" nor "appropriate," in light of the alternative federal administrative and judicial remedies available, under other federal statutes, to a service member demanding to be kept on the rolls. In a unanimous decision, the Supreme Court held that CAAF exceeded its supervisory jurisdiction under the All Writs Act.
  
7. **Recent Case Law (Post-Goldsmith).** *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days, the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also stated it has jurisdiction to review such a case under the All Writs Act, notwithstanding execution of the punitive discharge, but declined to decide which standard of review was more appropriate, direct or collateral.

8. *United States v. King*, No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000). Accused filed a motion to stay Article 32 proceedings but was denied relief by the NMCCA under *Clinton v. Goldsmith*. CAAF disagreed and granted the motion to stay under the All Writs Act. In a concurring opinion, Judge Sullivan stated, "this Court clearly has the power to supervise criminal proceedings under Article 32, UCMJ." *See also King v. Ramos*, No. NMCM 200001991 (Jan. 26, 2001).
9. *Ponder v. Stone*, 54 M.J. 613 (N-M. Ct. Crim. App. 2000). Accused refused order to receive anthrax vaccination and submitted a request for a stay of proceedings by way of a writ of mandamus. Government argued that the Navy court lacked jurisdiction to entertain the petition under *Goldsmith*, because the court could only grant extraordinary relief on matters affecting the findings and sentence of a court-martial. NMCCA disagreed, stating that review of the petition under the All Writs Act was properly a matter in aid of its jurisdiction.
10. *Fisher v. United States*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). Accused filed petition for extraordinary relief. The government argued that the appellate court had no jurisdiction to consider the petition because the accused's court-martial was final under Article 76. The NMCCA disagreed and considered the petition but denied it.

E. Extraordinary Circumstances.

1. Much like the military appellate courts, federal courts struggle with the scope of their jurisdiction under the All Writs Act. The Supreme Court held that federal courts can exercise writ jurisdiction to protect the legal rights of parties, and are not limited to orders protecting just the courts' own duties and jurisdiction. *See United States v. New York Telephone Co.*, 434 U.S. 159 (1977).
2. Ordinary course of appellate review of trial cannot give adequate relief. *Andrews v. Heupel*, 29 M.J. 743 (A.F.C.M.R. 1989). "An extraordinary writ is not to be a substitute for an appeal even though hardship may ensue from delay and perhaps an unnecessary trial."

3. Circumstances warrant extraordinary relief.
  - a. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993).  
Petitioner seeks extraordinary writ for release from confinement. CA commuted BCD to four months, but did so five months after sentencing. Accused was immediately taken to the brig at Camp Lejeune. The brig determined that the accused's sentence ran from date of sentence and not confinement and released the accused. A week later, the accused was taken to an Army facility. The Army facility took the position that the accused's sentence began on the date that the CA commuted the BCD to six months and incarcerated petitioner. Proper subject for review by Court, and ordered release.
  - b. *Keaton v. Marsh*, 43 M.J. 757 (Army Ct. Crim. App. 1996).  
Petition for writ of habeas corpus by accused who was ordered released from pretrial confinement by military magistrate, and subsequently ordered back into pretrial confinement by military judge. Court found propriety of accused's pretrial confinement proper subject for extraordinary writ, and ordered release.
  - c. Petition for writ of prohibition by accused who was a retiree challenging the right of the military justice system to exercise jurisdiction over him was an extraordinary situation warranting consideration. *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R. 1989). *See also Sands v. Colby*, 35 M.J. 620 (A.C.M.R.). 1992).
  - d. *Toohey v. United States*, No. 04-8019, 2004 CAAF LEXIS 656 ( Jul. 2, 2004). Petitioner seeks extraordinary writ for release from confinement because of lengthy appellate delay. The chronology of the case indicates that the Petitioner has not received his first level of appeal as of right more than five years and ten months after his sentence was adjudged. Court agrees that delay is unreasonable but does not order release. Court gives Navy-Marine Corps Court 90 days to issue decision.

- e. *United States v. Kreutzer*, 60 M.J. 453 (2005). (Crawford, J., dissenting). As Petitioner not currently under sentence of death, writ of mandamus granted to the extent that Petitioner must be moved from death row.
  - f. *United States v. Buber*, 61 M.J. 70 (2005). (Crawford, J., dissenting). Army Court dismissed specification supporting remaining confinement and Government filed for reconsideration. Writ of habeas corpus granted with direction to release Petitioner from post-trial confinement immediately.
- 4. Available remedies are exhausted.
  - 5. Relief will advance judicial economy.
    - a. Maximize utility of judicial resources.
    - b. Resolve recurrent issues that will inevitably lead to more cases in the future.
    - c. To prevent a waste of time and energy of military tribunals.

## II. WRIT CLASSIFICATIONS.

- A. **Mandamus.** Directs a party to take action; rights are not established or created; pre-existing duty enforced.
- B. **Prohibition.** Directs a party to cease doing an act or prohibits execution of a planned act that violates a law or an individual's rights.
- C. **Error Coram Nobis.** "Error in our court"; a review of a court's own prior judgment predicated on a material error of fact, or to correct constitutional or fundamental errors, including those sounding in due process.
- D. **Habeas Corpus.** "That you have the body"; directs the release of a person from some form of custody.

### III. FILING A WRIT.

#### A. Preliminary Considerations.

1. Does the case qualify?
  - a. Jurisdiction.
  - b. Extraordinary circumstance.
  - c. Relief sought.
2. Must the military judge grant a continuance?
  - a. Discretion of the military judge (R.C.M. 906(b)(1)).
  - b. No automatic stay; but once a stay is issued by CCA or CAAF, proceedings **must** stop.
3. Which forum?
  - a. There is a preference for initial consideration by a CCA. *See ABC, Inc. v. Powell*, 47 M.J. 363 (1997); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981) (opinion of Cook, J.); *See also* R.C.M. 1204(a), Discussion (C.M.R. filing favored for judicial economy).
  - b. CAAF, Rules of Practice and procedure, Rule 4(b)(1): The Court may, in its discretion, entertain original petitions for extraordinary relief . . . Absent good cause, no such petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals. Original writs are rarely granted.
  - c. Considerations of time and subject matter.

4. Special rule for trial counsel. Before filing an application for extraordinary relief on behalf of the government, government representatives should (will) coordinate with Appellate Government.

B. Procedure.

1. Petitioner has initial burden of persuasion to show jurisdiction and extraordinary circumstances. The party seeking relief has an “extremely heavy burden.” *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997; *United States v. Mahoney*, 36 M.J. 679, 685 (A.F.C.M.R. 1992). The petitioner must show that the complained of actions were more than “gross error” and constitute a “judicial usurpation of power.” *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996).
2. The “show cause” order shifts burden.

#### **IV. GOVERNMENT APPEALS.**

A. Introduction.

Article 62, UCMJ; R.C.M. 908(a). In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, excludes evidence that is substantial proof of a fact material in the proceedings, or affects the disclosure or nondisclosure of classified information. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification.

B. Qualifying Proceeding.

1. Military judge presides; and

2. A punitive discharge may be adjudged. This includes a rehearing on sentence which did not result in a punitive discharge. *See United States v. Davis*, 63 M.J. 171 (2006) (“We conclude that the Government properly appealed the military judge’s decision under Article 62, UCMJ, as the sentence rehearing was empowered to adjudge any sentence authorized for the underlying offenses regardless of the sentence approved after the original trial.”)

C. Qualifying Ruling.

1. “... *order or ruling that terminates the proceedings with respect to a charge or specification.*” R.C.M. 908(a).
  - a. *United States v. Dossey*, 66 M.J. 619 (N-M. Ct. Crim. App. 2008). Accused charged with various offenses related to using government computers to access child pornography. Military judge granted defense motion, in part, to exclude evidence obtained from a search of the government’s computer. The government later introduced evidence in front of the panel that violated the military judge’s ruling. The military judge declared a mistrial to the affected charge and specification. The government appealed the decision pursuant to Article 62. The Navy-Marine Court of Criminal Appeals initially denied the government’s appeal stating that it did not have jurisdiction. The Navy-Marine Court of Criminal Appeals reconsidered its ruling and determined that “terminates the proceedings” means to “terminate the proceedings *before the particular court-martial* to which a charge has been referred” and that it had jurisdiction. The court then vacated the military judge’s order declaring a mistrial and reinstated the original charge and specification.

- b. *United States v. Weymouth*, 40 M.J. 798 (A.F.C.M.R. 1994), *aff'd* 43 M.J. 329 (1995). Accused charged with various offenses arising out of stabbing fellow airman (attempted murder, assault with intent to commit murder, assault by stabbing with a dangerous weapon, assault by IIGBH). MJ granted defense motion to dismiss all but attempted murder on multiplicity grounds, but advised parties he would instruct on any lesser-included offenses raised by the evidence during trial. Parties further agreed accused could only stand convicted of one offense. AFCMR held that MJ “terminate[d] the proceedings with respect to a charge or specification” when dismissed on multiplicity grounds; although he would instruct on lesser-included raised by the evidence, no recourse was likely for the government if the MJ concluded that the LIO was not raised by the evidence. Thus, jurisdiction was proper under Article 62, UCMJ.
  - c. *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989). The court reversed the trial court's ruling to dismiss a charge alleging a violation of Article 134 (sexually transmitting a deadly virus).
2. **“... order or ruling . . . which excludes evidence that is substantial proof of a fact material...”** R.C.M. 908(a).
- a. *United States v. Baldwin*, 54 M.J. 551 (A.F. Ct. Crim. App. 2000). Appellate court found, on reconsideration request by government, that military judge erroneously suppressed the accused's confession.
  - b. *United States v. Stevenson*, 53 M.J. 257 (2000), *cert. denied*, No. 00-919, 2001 U.S. LEXIS 2192 (U.S. Mar. 19, 2001). Government appealed the NMCCA decision affirming the military judge's ruling to suppress DNA evidence obtained from the accused's blood. CAAF reversed the NMCCA and returned the case to the Navy for remand to the court-martial for trial on the merits.
  - c. *United States v. Moore*, 41 M.J. 812 (N-M. Ct. Crim. App. 1995). The appellate court reversed the MJ's grant of defense's motion to suppress the results of two urine tests. In case of urinalysis testing, MJ's findings regarding the “primary purpose” may be a “matter of fact,” but “whether the examination is an inspection, is a matter of law.”

- d. *United States v. Phillips*, 30 M.J. 1 (C.M.A. 1990) (hearing a government appeal concerning the MJ’s ruling that the accused was improperly “seized” within the meaning of the fourth amendment; trial court upheld).
  - e. *United States v. Konieczka*, 30 M.J. 752 (A.C.M.R. 1990) (considering whether a urinalysis test was properly suppressed; trial court reversed).
  - f. *United States v. Austin*, 21 M.J. 592 (A.C.M.R. 1985) (considering whether a urinalysis test was properly suppressed; trial court upheld).
  - g. “It is sufficient that the petitioner believes that the evidence is significant.” *United States v. Scholz*, 19 M.J. 530 (A.F.C.M.R. 1984). *See also United States v. Pacheco*, 36 M.J. 530 (A.F.C.M.R. 1992) (“it is not necessary that the evidence suppressed be the only evidence in the case”); *United States v. Hamilton*, 36 M.J. 927 (A.F.C.M.R. 1993).
3. Or, the **functional equivalent** of an R.C.M. 908 appealable order.
- a. *United States v. Sepulveda*, 40 M.J. 856 (A.F.C.M.R. 1994). The MJ granted defense’s motion to dismiss three specifications of indecent acts as lesser-included offenses of three indecent assault specifications also charged, and further granted defense’s motion to consolidate three specs of indecent assault into one specification. AFCMR found jurisdiction for appeal appropriate to determine whether dismissal should be with or without prejudice, because the MJ terminated proceedings with regard to indecent acts specifications. Jurisdiction was also proper with regard to the consolidated specs. since consolidation is a functional equivalent of dismissal.
  - b. *United States v. True*, 28 M.J. 1 (C.M.A. 1989). The MJ’s abatement order was the “functional equivalent” of a ruling that terminates the proceedings. The MJ ordered the Government to provide a defense expert and the CA would not pay. Use the “practical effects” test. *See also United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992).

- c. *United States v. Harding*, 63 M.J. 65 (CAAF 2006). MJ's abatement order in this case was not a "termination of proceedings" and the Government appeal was not valid under Article 62, UCMJ. MJ simply abated proceedings pending enforcement of a warrant of attachment; in this case the Government acknowledged that the Marshal's Service had not enforced the writ of attachment the MJ issued to obtain certain records.
  
4. **BUT NOT** "an order or ruling that is, or amounts to, a finding of not guilty of a charge or specification".

*United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000). Appellate court lacked jurisdiction to hear government appeal of military judge's granting of defense motion for a finding of not guilty pursuant to R.C.M. 917. *But see United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995). A court-martial panel president announced guilty to specification "by absolute majority." Voir dire of the panel indicated several straw votes were taken on the specification - which resulted in insufficient votes to convict - MJ entered finding of not guilty to specification. Government filed appeal under R.C.M. 908. The appellate court had jurisdiction, notwithstanding a *finding of not guilty*, since MJ's characterization of the action was not controlling, and since the case was a members trial, only the panel could evaluate the evidence and render findings as to guilt or innocence (except for R.C.M. 917 finding). Therefore, the act of the MJ amounted to a dismissal with prejudice, and was a proper subject for government appeal.

5. **Classified Information.** The 1996 expansion of Art. 62, and 1998 changes to R.C.M. 908(a), permits appeal of a judge's order or ruling directing disclosure of classified information or imposing sanctions for nondisclosure of classified information. The government may also appeal a refusal of the judge to issue a protective order to prevent disclosure of classified information, or refusal to enforce such an order previously issued by competent authority.

- D. **Further appellate review.** In *United States v. Lopez de Victoria*, 66 M.J. 67 (2008), the CAAF decided 3-2 that it had statutory authority to exercise jurisdiction over the courts of criminal appeals' decisions in Article 62 cases despite the absence of an express grant of authority in Article 67 (a). Relying on the express language in Article 67 (a) that the CAAF has jurisdiction over "all cases reviewed by a Court of Criminal Appeals . . . ," the majority reasoned that Congress intended uniformity in the application of the Code between the services. If "all cases" did not include government appeals, which are by their very nature interlocutory appeals, then the purpose of the statute would be defeated. The dissent reasoned that nothing in the plain language of Article 62, Article 67, or any other statute grants the CAAF the statutory authority to entertain an Article 62 appeal.

## V. GOVERNMENT APPEAL PROCEDURE.

- A. Trial counsel may request a delay of not more than 72 hours. R.C.M. 908(b)(1).
1. A court-martial may not proceed, except as to matters unaffected by the ruling or order.
  2. However, if the order is nonappealable within the meaning of R.C.M. 908, the trial judge may properly proceed with the trial. *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985).
- B. The decision to file a notice of appeal with the judge must be authorized by the SJA or the GCMCA. For example, *see* DEP'T. OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 13-3(a) (16 Nov 2005) (effective 16 Dec 2005).
- C. Written notice of the appeal must be filed with the military judge not later than 72 hours after the ruling or order. R.C.M. 908(b)(3).

*United States v. Flores-Galarza*, 40 M.J. 900 (N.M.C.M.R. 1994). The appellate court found R.C.M. 908 provision to file appeal within 72 hours mandatory, and a MJ has no authority to extend the time for filing appeal notice. To avoid procedural issues in the future, the court recommended the following: 1) MJ should enter essential findings contemporaneously with ruling on motion; 2) MJ should state on record that his action is ruling of the court; 3) if MJ rules adverse to the government on a

significant matter, the MJ should then ascertain on the record whether the government is contemplating an appeal; and, 4) if the government is contemplating an appeal, the MJ should state on record the time of the ruling, i.e., the time the 72-hour period will run, and how and where the government may provide the MJ with written notice of appeal.

- D. Written notice to the military judge shall (R.C.M. 908(b)(3)):
1. Specify the order appealed and the charges and specifications affected.
  2. Certify that the appeal is not for the purpose of delay.
  3. Certify that the evidence excluded is substantial proof of a material fact.
- E. **Automatic Stay.** Notice of appeal “automatically stays” trial proceedings except as to unaffected charges or specifications. R.C.M. 908(b)(4).
1. Motions may be litigated in the judge’s discretion.
  2. If trial on merits has not begun:
    - a. Severance at the request of all parties.
    - b. Severance requested by the accused to prevent manifest injustice.
  3. If trial on merits has begun: a party may put on additional evidence within the judge’s discretion.
  4. Requesting reconsideration.

- a. Should be undertaken upon request. *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985). *But see United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990) (military judge did not abuse his discretion in denying the prosecution's request to reopen after granting the defense motion to suppress the accused's confession).
  - b. Scope of reconsideration. *Harrison v. United States*, 20 M.J. 55 (C.M.A. 1985). A trial judge has inherent authority, not only to reconsider a previous ruling on matters properly before him, but also to take additional evidence in connection therewith.
  - c. Effect of reconsideration and time limits. *United States v. Santiago*, 56 M.J. 610 (N-M. Ct. Crim. App. 2001). The denial of a reconsideration ruling can be appealed, and the time limit within which to appeal does not start until the trial court rules on the petition for reconsideration. While the MCM does not address timeliness of request for reconsideration, the time limits from Article 62 and R.C.M. 908 are appropriately applied to such requests in assessing the timeliness for purpose of appeal.
- F. Speedy trial rules are generally not a problem as long as the appeal is not frivolous. *See* R.C.M. 707 (b)(3)(c) and R.C.M. 707(c). *See also United States v. Ramsey*, 28 M.J. 370 (C.M.A. 1989) (“[a] frivolous appeal is one where the law is so clear and well-established that continued litigation is evidence of bad faith.”) The government gets a NEW 120 DAY CLOCK. R.C.M. 707(b)(3)(C).
- G. Pretrial confinement of accused pending government appeal. R.C.M. 908(b)(9):
- If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).
- H. Record of trial. R.C.M. 908(b)(5).

1. Prepared and authenticated to the extent necessary to resolve the issue appealed.
  2. Essential findings.
    - a. When ruling on motions to suppress evidence, military judges are required to state their essential findings of fact on the record (R.C.M. 905(d)).
    - b. Findings should be logical and complete enough so that there is no need to resort to other parts of the record for meaning.
    - c. Military judge should state the legal basis for the decision—the legal standards applied and the analysis of the application of these standards to the facts previously stated.
    - d. Military judge should state any conclusions made and the decision.
    - e. Help frame issues at the trial level; seek clarity and precision in judge’s ruling.
  3. Military judge or Court of Criminal Appeals may require additional portions of the record.
- I. “Forwarding” of the appeal to government representative. R.C.M. 908(b)(6).
1. Statement of the issues appealed.
  2. The original record or summary of the evidence.
  3. Within 20 days from the date written notice of appeal is filed with the trial court.

- a. *United States v. Combs*, 38 M.J. 741 (A.F.C.M.R. 1993). Government appeal properly dismissed for failure to promptly forward.
  - b. *United States v. Snyder*, 30 M.J. 662 (A.F.C.M.R. 1990). The government failed to forward the authenticated ROT within 20 days; the accused had remained in pretrial confinement pending resolution of appeal. HELD: “The right to liberty is too fundamental to apply an ‘almost good enough’ standard to the government’s actions.”
- 4. Mailing within 20 days meets the requirements of “forwarding.” *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991) *aff’d* 36 M.J. 2 (C.M.A. 1992).
  - 5. The Chief, Government Appellate Division, makes the decision whether to file the appeal; therefore coordinate with Government Appellate from the beginning.

## VI. APPELLATE REVIEW.

- A. Initially, *must be* filed at Court of Criminal Appeals.
- B. Appellate counsel represent the parties. But trial counsel and trial defense counsel must maintain close contact with appellate counsel.
- C. Priority review.
- D. Courts of Criminal Appeals “may take action only with respect to matters of law.” *See United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986).
- E. **Standard of review.**
  - 1. Did the military judge “err as a matter of law”?
    - a. Questions of law are reviewed de novo. *United States v. Kosek*, 41 M.J. 60 (1994).

- b. *See United States v. Rittenhouse*, 62 M.J. 509 (Army Ct. Crim. App. 2005) (holding military judge erred in applying the law to computer evidence and admissions).
  2. Findings of fact?
    - a. “[I]f a military judge’s finding of fact is supported by the evidence of record (or lack thereof), then it shall not be disturbed on appeal taken under Article 62.” *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990).
    - b. *United States v. Lincoln*, 42 M.J. 315 (1995). NMCMR reversed MJ on a government appeal of the suppression of a confession, and ordered the confession admitted into evidence. CAAF noted, “on questions of fact the appellate court is limited to determining whether the military judge’s findings are clearly erroneous or unsupported by the record. If the findings are incomplete or ambiguous, the ‘appropriate remedy . . . is a remand for clarification’ or additional findings.”
    - c. *United States v. Reinecke*, 30 M.J. 1010 (A.F.C.M.R. 1990). When ruling on motions to suppress, the MJ is required to state essential findings on the record; findings stated separately and succinctly; findings logical and complete enough so the appellate court does not have to resort to other parts of record for meaning; after stating findings, MJ should state legal basis for decision, *i.e.*, legal standards applied and analysis of the application of the standards to the facts previously stated; and, MJ should state any conclusions made and why.
3. **BUT** “clearly erroneous” factual findings do not bind Courts of Criminal Appeals.

- a. *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985); *United States v. Clarke*, 23 M.J. 519 (A.F.C.M.R. 1986), *aff'd* 23 M.J. 352 (C.M.A. 1987) (...“We will reverse for an abuse of discretion if the military judge’s findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law.... ” *United States v. Dooley*, 61 M.J. 258 (2005), citing *United States v. Gore*, 60 M.J. 178 (2004).
  
- b. *United States v. Hatfield*, 43 M.J. 662 (N.M. Ct. Crim. App. 1995). MJ dismissed charges on speedy trial grounds. NMCCA reversed on government appeal, applying standard of review that “findings by the trial court are ‘clearly erroneous’ when, although there is some evidence to support them, the appellate court is left with the definite and firm conviction that a mistake has been made.” Appellate court cannot simply substitute its own judgment of what constitutes “reasonable diligence.”

F. CAAF or U.S. Supreme Court may stay trial pending additional review.

## **VII. CONCLUSION.**